

by Alicia Triche



Detention, Judicial Review, and “National Security”

In response to the recent “surge” of Central American migrants, the Department of Homeland Security (DHS) has adopted detention as a strategy of deterrence.¹ According to the *New York Times*, approximately 40,000 adults and accompanied children arrived at the border between October 2013 and August 2014.² This population is separate and distinct from the unaccompanied minors who have also been arriving, and different law governs their detention. Under federal law, custody and release of any “unaccompanied alien child” falls under the purview of the Office of Refugee Resettlement.³ However, when a child arrives with a parent or guardian, the detention provisions of the Immigration and Nationality Act (INA) apply just as they do for adults, and custody is administered by the DHS.⁴

In mid-2014, explicitly acknowledging the intent to deter further arrivals, the DHS began to use family detention centers for this population.⁵ As of October 2014, the agency was holding several hundred migrant families at facilities in Artesia, New Mexico, and Karnes, Texas; and immigration advocates reported the DHS plans to detain approximately 4,000 such migrants by the end of the year.⁶ Reportedly, the DHS is arguing that this detention en masse, without bond or with prohibitively high bond amounts, is necessary for national security. The policy is rooted in the 2003 case of D-J-, an 18-year-old Haitian asylum seeker who, along with 216 others on the same boat, made it past the U.S. Coast Guard before being intercepted and placed into removal proceedings in Florida.⁷ Overturning the Board of Immigration Appeals, then Attorney General John Ashcroft ruled that releasing D-J-, along with any other “similarly situated undocumented seagoing migrants ... would give rise to adverse consequences for national security and sound immigration policy.”⁸ According to “court documents” from Artesia, the DHS has similarly “argued that releasing any detainees ... ‘further encourages mass migration’ and ‘would create significant adverse national security consequences.’”⁹

Refugee and immigration advocates have argued forcefully that such detention, which often involves asylum-seeking mothers and their infants, is not necessary for national security.¹⁰ And in certain circumstances, the assertion that it is, is subject to judicial review. 8 C.F.R. § 1003.19 provides those aliens in removal proceedings who are not charged as “arriving” are entitled, upon request, to review of

the conditions of their custody by an immigration judge.¹¹ In turn, the Board of Immigration Appeals has jurisdiction to review any bond decision made by an immigration judge.¹² Finally, detention of noncitizens is subject to habeas review under 28 U.S.C. § 2241. Each of these provisions affords judicial review of the question of whether, as a matter of law, detention of any particular noncitizen is warranted for the purposes of national security.¹³

In practice, that “legal” assessment is fraught with political complexity. What room can there be for judicial review when “national security” is asserted by the very government officials who are also charged with protecting it? This question calls for consideration of the difference between legal definitions of national security and its existence as a political concept. In the legal context, national security is a term defined in U.S. immigration law. In one section, the INA defines national security as “the national defense, foreign relations, or economic interests of the United States.”¹⁴ In the context of removal, the INA describes “security and related grounds” as “espionage or sabotage,” illegal export of “goods, technology, or sensitive information,” “criminal activity which endangers public safety or national security,” and “any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means.”¹⁵ Arguably, both of these seem to view national security through its traditional lens, in which the objective was to “secure the State against those objective threats that could undermine its stability and threaten its survival,” with a focus on “the phenomenon of war” and “the threat, use, and control of military force.”¹⁶ However the definition is viewed, though, it is clear that a reviewing judge has the power to make that interpretation. The phrase “national security” is part of the law and may be interpreted by judges just as any other legal term.

In a different arena, national security is a political animal. Historian David Yergin recounts that the phrase became common in American discourse in the mid-1940s.¹⁷ Since that time, the public understanding of national security has been continually expanding. Defense strategies once focused on preventing the arrival of enemy troops have expanded to address an almost unlimited array of potential threats—including, specifically, “illegal immigration.”¹⁸

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In this context, including a threat in the national security category could reflect a government agency's assertion of a security agenda, rather than an assertion that there is a threat to the State itself sufficient to justify the legal definition.

Reviewing judges have the power to make that distinction. They can require the DHS to demonstrate, not merely assert, that a threat claimed falls properly into the *legal* category of national security.¹⁹ Immigration judges, in particular, are specifically vested with independent discretion under 8 C.F.R. § 1003.10:

In deciding the individual cases before them, and subject to the applicable governing standards, immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases.

Unfortunately, despite the independent power of judiciary, in the national security context, judicial review has sometimes reflected what one scholar calls "submissive deference."²⁰ When this occurs, a court refrains from meaningfully examining the substantive question of whether an actual, objective threat to national security has been identified by the State under applicable legal standards. Questions such as "what sector of the 'nation' is threatened," "what potential events constitute the 'danger' asserted," "how severe and proximate is the danger asserted," and "how would this individual cause that danger" are all left unasked. Instead, the bulk of the "legal" review regards whether a governmental official has acted within the bounds of delegated statutory authority and followed the proper procedures.

In the context of the recent "surge," judicial review calls for more than just submissive deference. The DHS should be required to demonstrate, not merely assert, as a matter of law, that the "national security" grounds for detention is properly invoked. As security scholars Lustgarten and Leigh assert, in a democracy, "[a]ccountability is not a philosophical abstraction ... it is a keystone of the state itself which is being protected."²¹ In this sense, meaningful judicial review of detention is essential not only to these asylum seekers but also to those of us who detain them. ©

Endnotes

¹See, e.g., Julia Preston, *As U.S. Speeds the Path to Deportation, Distress Fills New Family Detention Centers*, N.Y. TIMES, Aug. 5, 2014, nyti.ms/1zSbDKs.

²*Id.*

³6 U.S.C. §§ 279(b)(1)(C), 279(g)(2).

⁴See, e.g., 8 U.S.C. § 1103(a)(1) ("The Secretary of Homeland Security shall be charged with the administration and enforcement of this Act...."), 8 U.S.C. § 1226(a) (general authority to apprehend and detain).

⁵Preston, *supra* note 1.

⁶*Id.*; AILA Infonet Doc. No. 14091649 (Sept. 16, 2014).

⁷See Margaret H. Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOYOLA L. REV. 149, 164–68.

⁸*Matter of D-J-*, 23 I&N Dec. 572, 579 (A.G. 2003).

⁹Preston, *supra* note 1.

¹⁰See, e.g., Gayla B. Ruffer & Lory D. Rosenberg, *Back*

to the Dark Ages? The Imminent Danger of a Regional Domino Effect in Obama's Hardline Policy for Mothers Fleeing Central America, HUFFINGTON POST, Oct. 6, 2014, www.huffingtonpost.com/galya-ruffer/back-to-the-dark-ages-the-b-5923690.html; AILA Infonet Doc. No. 14092254 (Sept. 22, 2014) (American Immigration Lawyers Association press release opposing "Denying Bond to All Mothers and Children from Central America").

¹¹According to former Judge Lory Rosenberg, who has worked as a volunteer attorney at Artesia, some asylum applicants are being placed in § 240 proceedings after passing their credible fear interviews. This means that they are not charged as "arriving aliens," and so a bond redetermination is allowed under 8 C.F.R. § 1003.19(h)(2).

¹²8 C.F.R. § 1003.19(f).

¹³Under 8 C.F.R. § 1236.1(c)(8), bond may be set for aliens who are able to demonstrate that they "would not pose a danger to property or persons" and they are "likely to appear for any future proceeding."

¹⁴INA § 219(d)(2). Technically, this definition applies only to the "Designation of Foreign Terrorist Organizations."

¹⁵INA § 237(a)(4)(i)–(iii). The inadmissibility ground is substantially similar. INA § 212(a)(3)(A).

¹⁶RONNIE D. LIPSCHUTZ, *Introduction*, in ON SECURITY (Ronnie D. Lipschutz ed., 1995); BARRY BUZAN, OLE WAEVER & JAAP DE WILDE, SECURITY: A NEW FRAMEWORK FOR ANALYSIS 3 (1998) (citations and internal quotations omitted).

¹⁷DAVID YERGIN, SHATTERED PEACE: THE ORIGINS OF THE COLD WAR AND THE NATIONAL SECURITY STATE 194 (1977).

¹⁸U.S. DEP'T OF DEFENSE, THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA (Mar. 2005), [www.defense.gov/news/ Apr2005/d20050408strategy.pdf](http://www.defense.gov/news/Apr2005/d20050408strategy.pdf) (last visited Oct. 12, 2014).

¹⁹This is not necessarily at odds with D-J-'s directive that "where the Government offers evidence from sources in the Executive Branch with relevant expertise establishing that significant national security interests are implicated, IJs and the BIA shall consider such interests." 23 I&N Dec. at 581.

²⁰David Dyzenhaus, *Deference, Security and Human Rights*, in SECURITY AND HUMAN RIGHTS 125, 131 (Benjamin J. Goold & Liora Lazarus eds., 2007).

²¹LAURENCE LUSTGARTEN & IAN LEIGH, IN FROM THE COLD: NATIONAL SECURITY AND PARLIAMENTARY DEMOCRACY 16 (1994).

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